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8 Attorneys for SUN MICROSYSTEMS, INC.

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN JOSE DIVISION

12 In re Application of Microsoft Corp.

Case No. 06-80038 JF (PVT)

14 **SUN MICROSYSTEMS, INC.'S**  
15 **OBJECTIONS TO MICROSOFT'S**  
16 **SUBPOENA DUCES TECUM FOR**  
17 **PERSONAL APPEARANCE AND**  
18 **PRODUCTION OF DOCUMENTS AND**  
19 **THINGS**

20 Date: To Be Set  
21 Time: To Be Set  
22 Before: Magistrate Patricia V. Trumbull  
23 Place: To Be Set

24 Complaint Filed: N/A  
25 Trial Date: N/A

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28  
1-SF/7349805.1

OBJECTIONS TO MICROSOFT'S SUBPOENA DUCES TECUM  
Case No. 06-80038 JF (PVT)

1 Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Sun  
2 Microsystems, Inc. ("Sun") hereby objects to Microsoft Corporation's ("Microsoft") Subpoena  
3 for Personal Appearance and Production of Documents and Things. Due to the numerous  
4 problems with the Subpoena, Sun will not appear for deposition or produce documents in  
5 response to this Subpoena.

6 Counsel for Microsoft has agreed that because Sun's objections to all document requests  
7 and deposition subjects are the same, the objections may be stated once and, thereafter,  
8 incorporated by reference and it will not be deemed a waiver of any objections.

### 9 **PRELIMINARY STATEMENT**

10 Based on an *ex parte* Order from this Court, Microsoft has served a subpoena on Sun  
11 pursuant to 28 U.S.C. § 1782, which permits, but does not require, U.S. courts to "provide  
12 assistance" to litigants in foreign legal proceedings. The Court must exercise its discretion in  
13 determining whether to permit the requested discovery. The Court's discretion, however, is not  
14 boundless. The Court must make its determination pursuant to a set of factors unique to this  
15 setting, including whether the requested discovery would circumvent the policies of the  
16 relevant foreign proceeding and whether the required discovery is welcomed in the foreign  
17 tribunal.

18 Sun objects to Microsoft's requested discovery as outlined below. Additionally, Sun  
19 intends to file a Motion to Quash on March 15, 2006. The European Commission has also  
20 gone on record in opposition to the requested discovery, characterizing Microsoft's Application  
21 as an "attempt to circumvent" its rules and policies and something that would "seriously harm  
22 the Commission's investigatory process."

### 23 **SUN MICROSYSTEMS, INC.'S OBJECTIONS TO MICROSOFT'S DOCUMENT**

#### 24 **REQUESTS AND SUBJECTS FOR DEPOSITION**

25 Pursuant to Rule 45(c)(2)(b) of the Federal Rules of Civil Procedure, third-party  
26 respondent Sun Microsystems, Inc. ("Sun") hereby objects and responds to the subpoena served  
27 on March 8, 2006, each document request and each deposition subject ("Requests") set forth  
28 therein, as follows:

**GENERAL OBJECTIONS**

1  
2           1.       Sun objects to the Requests as untimely. Microsoft intentionally delayed and, as a  
3 matter of pure tactic, waited to obtain an *ex parte* subpoena without prior notice to Sun and with  
4 an onerously short time to respond before the scheduled hearing. Microsoft has intentionally  
5 created a false urgency by its failure to act sooner. Microsoft has had ample opportunity to seek  
6 the information requested in the subpoena and, for months, has made no attempts to obtain this  
7 information.

8           2.       Sun objects to the Requests to the extent that the subpoena was obtained *ex parte*  
9 without notice and provides for insufficient time to respond in a case of such magnitude and  
10 complexity that has spanned several years. It is unreasonable to request that Sun review all  
11 documents requested, create privilege logs, confidentiality and trade secret logs, and prepare for  
12 testimony in the two weeks provided in the *Ex Parte* Order.

13           3.       Sun objects to the Requests to the extent that they seek production of documents  
14 and testimony from an interested person or party in the European Commission's ("Commission")  
15 proceeding and, as such, the Commission has the ability to order discovery if so desired.

16           4.       Sun objects to the Requests to the extent that Microsoft requested discovery from  
17 the Commission on March 2, 2006, one day before it filed this Application, and that request is  
18 pending and *sub judice* before the Commission Officer. The principles of comity require this  
19 Court not to intervene.

20           5.       Sun objects to the Requests to the extent that 28 U.S.C. Section 1782 authorizes,  
21 but does not require, allow discovery. Per the factors set forth in *Intel Corp. v. Advanced Micro*  
22 *Devices, Inc.*, 542 U.S. 241 (2004), this Court should exercise its discretion to not grant discovery  
23 under Section 1782.

24           6.       Sun objects to the Requests to the extent that, if granted, this Application would  
25 contradict the primary purpose of Section 1782—to assist and aide a foreign tribunal. The  
26 Commission is opposed to this discovery, and, as a result, if Microsoft's Application is granted,  
27 this Court would not be assisting or aiding the Commission.

28           7.       Sun objects to the Requests to the extent that they contradict another primary

1 purpose of 28 U.S.C. Section 1782, namely to encourage foreign tribunals to provide assistance to  
2 U.S. Courts that require access to evidence located abroad. *Schmitz v. Bernstein Liebhard &*  
3 *Lifshitz, LLP*, 376 F.3d 79, 84 (2d Cir. 2004). Microsoft's attempts to circumvent the interests of  
4 the Commission in enforcing its laws, if allowed to stand, would discourage foreign tribunals  
5 from assisting the U.S. in future foreign discovery efforts.

6 8. Sun objects to the Requests to the extent that the Commission strongly objects to  
7 going forward with discovery and the information sought will not be considered by the  
8 Commission at the Article 24 Hearing. Therefore, the burden and expense of the proposed  
9 discovery is greatly outweighed by any potential benefit.

10 9. Sun objects to the Requests to the extent that the subpoena is specifically designed  
11 to intimidate Microsoft's competitors, witnesses, and other individuals and to interfere with the  
12 Commission's attempts to enforce the Commission's competition laws.

13 10. Sun objects to the Requests to the extent that they contravene the Commission's  
14 rules of discovery and evidence.

15 11. Sun objects to the Requests to the extent that the subpoena is an attempt to  
16 circumvent the rulings, policies, and procedures of the Commission. The subpoena is an attempt  
17 to circumvent "foreign proof-gathering restrictions or other policies of a foreign country or the  
18 United States." *Intel Corp.*, 542 U.S. at 264.

19 12. Sun objects to the Requests to the extent that the principles of comity bar its  
20 enforcement. *Intel Corp.*, 542 U.S. at 240-42. The Commission is a regulatory and adjudicative  
21 body with its own extensive rules and this court should not interfere with its proceedings.

22 13. Sun objects to the Requests to the extent that they interfere with the Commission's  
23 ability to hear and process the case and undermine the Commission's efforts to enforce European  
24 Community Competition laws.

25 14. Sun objects to the Requests to the extent that they undermine and interfere with the  
26 European Commission's established evidence and fact gathering policies and procedures,  
27 including, but not limited to, the Commission's confidentiality policies.

28 15. Sun objects to the Requests to the extent that they request the production of

1 documents and information that are within the possession, custody, or control of the Commission,  
2 the Monitoring Trustee, or the OTR. The Commission should be permitted to decide, under its  
3 own laws, as it is presently doing, whether to permit Microsoft's access to the information.

4 16. Sun objects to the Requests to the extent that they seek production of documents  
5 which are not relevant to the claims and defenses of Microsoft or any other party to the Article 24  
6 hearing, as it is strictly limited to the issue of Microsoft's compliance with the March 24, 2004  
7 Decision of the Commission. All documents and testimony relating to any matter beyond this  
8 narrow scope are irrelevant.

9 17. Sun objects to the Requests to the extent that they seek information concerning  
10 entities not involved in the Article 24 hearing and are therefore irrelevant.

11 18. Sun objects to the Requests to the extent that any information sought that is  
12 relevant to the Article 24 hearing has already been produced to Microsoft by the Commission, or  
13 is *sub judice* before the Hearing Officer, and would, therefore, be duplicative of information  
14 already provided to Microsoft.

15 19. Sun objects to the Requests to the extent that the documents sought were not  
16 previously provided to the Commission prior to the Commission's issuance of the Statement of  
17 Objections. Thus, as the documents requested were not relevant to the Commission's issuance of  
18 the Statement of Objections, they are, therefore, irrelevant to the Article 24 hearing.

19 20. Sun objects to the Requests to the extent that they seek production of documents  
20 and information that Microsoft has previously sought from the Commission and the Commission  
21 has denied such requests. Such requests impinge on the sovereignty of the Commission and  
22 attempt to circumvent the Commission's jurisdiction.

23 21. Sun objects to the Requests to the extent that they seek production of documents or  
24 testimony protected by the attorney-client, work product, common interest, investigatory, or any  
25 other applicable privileges. A person may not be compelled to produce documents in violation of  
26 any legally applicable privileges. *See* 28 U.S.C. § 1782. The Advisory Notes to the 1991  
27 Amendments to Rule 45 recognize the problem of having to provide an extensive privilege log  
28 under circumstances like these and state as follows:

1 A person served a subpoena that is too broad may be faced with a burdensome task to  
2 provide full information regarding all that person's claims to privilege or work product  
3 protection. Such a person is entitled to protection that may be secured through an  
objection made pursuant to paragraph (c)(2).

4 Sun wishes to invoke the protection of Rule 45(c)(2) under these circumstances by making such  
5 an objection under this provision.

6 22. Sun objects to the Requests to the extent they seek confidential, proprietary, or  
7 highly sensitive information.

8 23. Sun objects to the Requests to the extent they seek to impose on it discovery  
9 obligations exceeding the scope of the Federal Rules of Civil Procedure and Local Rules of the  
10 United States District Court for the Northern District of California..

11 24. Sun objects to the Requests to the extent they seek to impose on it discovery  
12 obligations exceeding the scope of the rules of the Commission.

13 25. Sun objects to the Requests to the extent they are not set forth with sufficient  
14 particularity, and/or are vague, ambiguous, and unlimited in scope.

15 26. Sun objects to the Requests to the extent they fail to describe the documents and  
16 things sought with a reasonable degree of specificity.

17 27. Sun objects to the Definitions, Instructions, and the Requests as overly broad,  
18 unduly burdensome, oppressive, and beyond the proper scope of discovery.

19 28. Sun objects to the Requests to the extent they are unduly intrusive in that they are  
20 irrelevant to the Article 24 proceeding and the information sought contains confidential business  
21 information.

22 29. Sun objects to the Requests to the extent they are an impermissible fishing  
23 expedition and the requests are not set forth with sufficient particularity.

24 30. Sun objects to the Requests to the extent they seek unreasonably cumulative and  
25 duplicative information.

26 31. Sun objects to the Requests to the extent they seek documents that are not  
27 currently in Sun's possession, custody or control.

28 32. Sun objects to the Requests to the extent they seek documents that are located in

1 the territory of the Commission or in other territories outside of the United States. Section 1782  
 2 does not extend beyond the borders of the United States. *See Norex Petroleum, Ltd. v. Chubb Ins.*  
 3 *Co. of Canada*, 384 F.Supp.2d 45, 50–55 (D.D.C. 2005).

4 33. Sun objects to the Requests to the extent that they seek documents or testimony  
 5 protected by the right of privacy afforded under the laws of various states, including (but not  
 6 limited to) California.

7 34. Sun objects to the Requests to the extent they seek information that is readily  
 8 available to defendants through public sources and records, its own witnesses and materials,  
 9 and/or directly from third parties.

10 35. Sun objects to the Requests to the extent they call for testimony constituting legal  
 11 conclusions or expert opinions that are not appropriately addressed by fact witnesses.

12 36. Sun objects to the Requests to the extent that they seek inappropriate  
 13 expert/opinion testimony.

## 14 **DOCUMENT REQUESTS**

### 15 **DOCUMENT REQUEST NO. 1:**

16 All documents that contain, constitute, reflect, evidence, or refer to any communication or  
 17 correspondence between You and the Commission relating to the Interoperability Information or  
 18 to the proper interpretation of the terms “Interoperability” or “Interoperability Information” as  
 19 used in the 2004 Decision.

### 20 **RESPONSE TO DOCUMENT REQUEST NO. 1:**

21 Sun reasserts and incorporates each of the Objections set forth above.

### 22 **DOCUMENT REQUEST NO. 2:**

23 All documents that contain, constitute, reflect, evidence, or refer to any communication or  
 24 correspondence between You and the Monitoring Trustee relating to the Interoperability  
 25 Information or to the proper interpretation of the terms “Interoperability” or “Interoperability  
 26 Information” as used in the 2004 Decision.

### 27 **RESPONSE TO DOCUMENT REQUEST NO. 2:**

28 Sun reasserts and incorporates each of the Objections set forth above.



**DOCUMENT REQUEST NO. 3:**

All documents that contain, constitute, reflect, evidence, or refer to any communication or correspondence between You and OTR or any other consultant retained or consulted by the Commission relating to the Interoperability Information or to the proper interpretation of the terms "Interoperability" or "Interoperability Information" as used in the 2004 Decision.

**RESPONSE TO DOCUMENT REQUEST NO. 3:**

Sun reasserts and incorporates each of the Objections set forth above.

**DOCUMENT REQUEST NO. 4:**

All documents that contain, constitute, reflect, evidence, or refer to any communication or correspondence between You and any other third party relating to the Interoperability Information or to the proper interpretation of the terms "Interoperability" or "Interoperability Information" as used in the 2004 Decision.

**RESPONSE TO DOCUMENT REQUEST NO. 4:**

Sun reasserts and incorporates each of the Objections set forth above.

**DOCUMENT REQUEST NO. 5:**

All documents since March 24, 2004, that contain, constitute, reflect, evidence, or refer to any communication between You and the Commission about Microsoft's compliance or alleged failure to comply with European Community competition laws, including without limitation the 2004 Decision, the Article 24(1) Decision, or the SO.

**RESPONSE TO DOCUMENT REQUEST NO. 5:**

Sun reasserts and incorporates each of the Objections set forth above.

**DOCUMENT REQUEST NO. 6:**

All documents since March 24, 2004, that contain, constitute, reflect, evidence, or refer to any communication between You and the Monitoring Trustee about Microsoft's compliance or alleged failure to comply with European Community competition laws, including without limitation the 2004 Decision, the Article 24(1) Decision, or the SO.

**RESPONSE TO DOCUMENT REQUEST NO. 6:**

Sun reasserts and incorporates each of the Objections set forth above.



**DOCUMENT REQUEST NO. 7:**

All documents since March 24, 2004, that contain, constitute, reflect, evidence, or refer to any communication between You and OTR or any other consultant retained or consulted by the Commission about Microsoft's compliance or alleged failure to comply with European Community competition laws, including without limitation the 2004 Decision, the Article 24(1) Decision, or the SO.

**RESPONSE TO DOCUMENT REQUEST NO. 7:**

Sun reasserts and incorporates each of the Objections set forth above.

**DOCUMENT REQUEST NO. 8:**

All documents since March 24, 2004, that contain, constitute, reflect, evidence, or refer to any communication between You and any other third party about Microsoft's compliance or alleged failure to comply with European Community competition laws, including without limitation the 2004 Decision, the Article 24(1) Decision, or the SO.

**RESPONSE TO DOCUMENT REQUEST NO. 8:**

Sun reasserts and incorporates each of the Objections set forth above.

**OBJECTIONS TO DEPOSITION SUBJECTS****DEPOSITION SUBJECT NO. 1:**

Any communication or correspondence between You and the Commission, whether on behalf of Sun, another client, or yourself, relating to the Interoperability Information or to the proper interpretation of the terms "Interoperability" and "Interoperability Information" as used in the 2004 Decision.

**RESPONSE TO DEPOSITION SUBJECT NO. 1:**

Sun reasserts and incorporates each of the Objections set forth above.

**DEPOSITION SUBJECT NO. 2:**

Any communication or correspondence between You and the Monitoring Trustee, whether on behalf of Sun, another client, or yourself, relating to the Interoperability Information or to the proper interpretation of the terms "Interoperability" and "Interoperability Information" as used in

1 the 2004 Decision.

2 **RESPONSE TO DEPOSITION SUBJECT NO. 2:**

3 Sun reasserts and incorporates each of the Objections set forth above.

4 **DEPOSITION SUBJECT NO. 3:**

5 Any communication or correspondence between You and OTR or any other consultant  
6 retained or consulted by the Commission, whether on behalf of Sun, another client, or yourself,  
7 relating to the Interoperability Information or to the proper interpretation of the terms  
8 “Interoperability” and “Interoperability Information” as used in the 2004 Decision.

9 **RESPONSE TO DEPOSITION SUBJECT NO. 3:**

10 Sun reasserts and incorporates each of the Objections set forth above.

11 **DEPOSITION SUBJECT NO. 4:**

12 Any communication or correspondence between You and any other third party, whether  
13 on behalf of Sun, another client, or yourself, relating to the Interoperability Information or to the  
14 proper interpretation of the terms “Interoperability” and “Interoperability Information” as used in  
15 the 2004 Decision.

16 **RESPONSE TO DEPOSITION SUBJECT NO. 4:**

17 Sun reasserts and incorporates each of the Objections set forth above.

18 **DEPOSITION SUBJECT NO. 5:**

19 Any communications since March 24, 2004, between You and the Commission, whether  
20 on behalf of Sun, another client, or yourself, about Microsoft’s compliance or alleged failure to  
21 comply with European Community competition laws, including without limitation the 2004  
22 Decision, the Article 24(1) Decision, or the SO.

23 **RESPONSE TO DEPOSITION SUBJECT NO. 5:**

24 Sun reasserts and incorporates each of the Objections set forth above.

25 **DEPOSITION SUBJECT NO. 6:**

26 Any communications since March 24, 2004, between You and the Monitoring Trustee,  
27 whether on behalf of Sun, another client, or yourself, about Microsoft’s compliance or alleged  
28 failure to comply with European Community competition laws, including without limitation the

2004 Decision, the Article 24(1) Decision, or the SO.

**RESPONSE TO DEPOSITION SUBJECT NO. 6:**

Sun reasserts and incorporates each of the Objections set forth above.

**DEPOSITION SUBJECT NO. 7:**

Any communications since March 24, 2004, between You and OTR or any other consultant retained or consulted by the Commission, whether on behalf of Sun, another client, or yourself, about Microsoft's compliance or alleged failure to comply with European Community competition laws, including without limitation the 2004 Decision, the Article 24(1) Decision, or the SO.

**RESPONSE TO DEPOSITION SUBJECT NO. 7:**

Sun reasserts and incorporates each of the Objections set forth above.

**DEPOSITION SUBJECT NO. 8:**

Any communications since March 24, 2004, between You and any other third party, whether on behalf of Sun, another client, or yourself, about Microsoft's compliance or alleged failure to comply with European Community competition laws, including without limitation the 2004 Decision, the Article 24(1) Decision, or the SO.

**RESPONSE TO DEPOSITION SUBJECT NO. 8:**

Sun reasserts and incorporates each of the Objections set forth above.

**DEPOSITION SUBJECT NO. 9:**

The authenticity of the documents produced pursuant to this subpoena and the circumstances of their preparation.

**RESPONSE TO DEPOSITION SUBJECT NO. 9:**

Sun reasserts and incorporates each of the Objections set forth above.

1  
2 Dated: March 13, 2006

MORGAN, LEWIS & BOCKIUS LLP

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4 By 

James N. Penrod  
Attorneys for SUN MICROSYSTEMS,  
INC.  
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